BRUNEI REPORTS

Haji Johari bin Haji Abd Karim v Public Prosecutor

HIGH COURT (BANDAR SERI BEGAWAN) – CRIMINAL APPEAL NO 16 OF 1987
ROBERTS CJ
23 JANUARY 1989

Criminal Procedure – Appeal against conviction and sentence – Admissibility of statements – Threat of prosecution – Whether statement voluntary – Miscarriage of justice – Criminal Procedure Code, ss 285, 285A, 288, 291 & 371 – Prevention of Corruption Act, ss 6, 22, 24A & 28 – Interpretation and General Clauses Act (Cap 4), ss 2 & 37(2) – Penal Code, s 116

Criminal Procedure – Sentencing – Circumstances when sentences to run concurrently or consecutively

Evidence – Accomplices – Whether warning on lack of corroboration needed – Prevention of Corruption Act, ss 22, 24A & 28 – Testimony accepted by court

The defendant was convicted of two charges of corruption under the Prevention of Corruption Act ('the Act'). The defendant was sentenced to nine months' imprisonment on each charge; the sentences were to run consecutively. The defendant now appeals against both the convictions and sentences imposed.

The magistrate admitted five statements which the defence objected to. The magistrate noted that prior to the first occasion of recording the statements, s 22 of the Act was drawn to the attention of the defendant. He was warned that an offence would be committed if he refused to give a statement and would be subject to a fine. The magistrate also accepted the evidence of the two accomplices as truthful and rejected the defendant's version of events.

Held, dismissing the appeal:

(1) Section 22 of the Act does not itself make the failure of any person to render a statement under that section an offence, although there is a duty to do so. However, s 24A of the Act is sufficiently wide to include such a statement but it must be voluntary. The magistrate did not appear to have considered whether the reference made by the officer to an offence and a fine for the failure to comply with a request under s 22 of the Act amounted to a threat so as to vitiate any subsequent confession. Bearing in mind the provisions of the Criminal Procedure Code, the court found that the reference by the officer to the failure of the defendant to provide information amounting to an offence and punishable by a fine in law amounted to a threat of such a kind that a subsequent confession should have been ruled involuntary.

(2) The magistrate, however, found the evidence given by the witnesses, albeit accomplices, to be truthful and having warned himself of the danger of convicting on the uncorroborated evidence of an accomplice, he was satisfied beyond reasonable doubt, although s 28 of the Act did not require such a warning.

(3) The appellate court should only interfere with a finding of fact in rare instances and if it is clear that the trial court was seriously at fault. Although parts of the testimony of the two witnesses were contradictory, the trial court can believe the evidence of any witness so far as its essentials are concerned without having to accept as true everything which the witness said.

(4) Even if the statements were not admitted, the magistrate would still have accepted the evidence of the two witnesses as correct and therefore there had been no miscarriage of justice.

(5) The charges were separated by a period of more than three weeks and each charge involved a separate person and an entirely separate boat trip. As such, there are separate and distinct offences and consecutive sentences should be imposed.

Case referred to

1 *PP* v *Hamid bin Ibrahim* Criminal Appeal No 1/86 (unreported) (folld)

Legislation referred to

Criminal Procedure Code ss 271, 285, 285A, 288, 291, 371
Interpretation and General Clauses Act (Cap 4) ss 2(1), 37(2)
Penal Code s 16
Prevention of Corruption Act (Cap 131) ss 5, 22, 24A, 28

Raymond Szetu for the appellant.
James Chiew (Deputy Public Prosecutor) for the Public Prosecutor.

Cur Adv Vult

Roberts CJ: The appellant was originally charged before a magistrate on 37 charges under the Prevention of Corruption Act (Cap 131). In the course of the trial, either the prosecution offered no further evidence, or the magistrate found that the defendant had no case to answer, on 35 of these charges. This left only the first and second charges, of which the defendant was convicted by the magistrate and sentenced to nine months' imprisonment on each charge, these sentences to run consecutively, on 17 October 1987.

The defendant has appealed under s 271 of the Criminal Procedure Code (CPC) against both the judgment of the magistrate and the severity of the sentences imposed by him.

I should again make it clear that it must only be in exceptional circumstances that a magistrate should grant bail to a defendant who has been sentenced to immediate imprisonment. One of those circumstances, however, is the wish of both the accused and the prosecutor to obtain a ruling of the High Court on a point of law.

I understand that bail was granted, in this appeal, pending its hearing, at the request of the defence and with the agreement of the prosecution. However, the prosecution appears to have been ready to argue the appeal as early as November 1987, although the hearing of the appeal was adjourned on at least three occasions at the request of the defence.

It is therefore clear that, in this instance, no criticism can properly be levelled at the public prosecutor

and that any delay, which has occurred in the hearing of the appeal, has been caused by the conduct of the defence alone. As a result of this, I have not taken into account as a mitigating factor, the very long interval between the imposition of a sentence of imprisonment by the magistrate and the hearing of the appeal by me.

Criminal Procedure Code

In dealing with this appeal, under the CPC, I have borne in mind the provisions of the following sections of the Code:

(a) section 285, which empowers the High Court on an appeal from a conviction to take various courses of action, among them a dismissal of the appeal with an upholding of the conviction and the maintainance of the sentence imposed;
(b) section 285A, which allows the High Court to reduce or increase a sentence or alter its nature, where there has been an appeal as to sentence;
(c) section 288, which obliges the High Court, when an appeal is being heard, to give judgment at once or on some future day, of which notice has been given to the parties;
(d) section 291, which states that the High Court shall not reverse or set aside a judgment or order of a magistrate's court unless it is shown to the satisfaction of the High Court that this judgment or order was wrong in law or against the weight of evidence or, in the case of a sentence, inappropriate in the circumstances of the case;
(e) section 371, which states that the High Court shall not reverse or alter a finding, sentence or order of a magistrate on the ground that there has been an improper admission or rejection of evidence, unless this has occasioned a failure of justice;
(f) section 371(2) adds that, in determining whether there has been a failure of justice, the court shall have regard to whether the argument could or should have been raised at an earlier stage in the proceedings.

I have already given my judgment on the appeal verbally, dismissing appeals against both conviction and sentence and announcing that I would give my reasons therefor later.

Section 22 of the Prevention of Corruption Act

The defence objected to the admissibility of a number of statements made by the defendant to officers of the Anti-Corruption Bureau ('ACB'). In consequence of that objection, the magistrate duly held a voire dire, in the course of which the defendant gave evidence.

The magistrate, at the conclusion of that evidence, duly admitted the five statements which the defendant had made on 21, 22, 23 and 24 February and 2 March to ASI Hadanan at the ACB office. As the magistrate noted, when admitting these statements, on the first occasion ASI Hadanan, before he began to record the defendant's statement, drew his attention to s 22 of the Prevention of Corruption Act (Cap 131). Section 22 of that Act states:

> Every person required by any officer of the Bureau or a police officer to give any information on any subject which it is the duty of such officer to inquire into under this Act or any prescribed offence and which it is in his power to give, shall be legally bound to give the information.

According to ASI Hadanan, the defendant was asked to read s 22 and warned that if he refused to do so he would be committing an offence and that he would be liable to a fine. It is to be noted that s 22 does not itself make the failure of any person to render a statement under that section an offence.

The public prosecutor, however, sought to rely on s 37(2) of the Interpretation and General Clauses Act, which is in the following terms:

> (2) Subject as hereinafter provided, a contravention of a written law which has not expressly been declared to be an offence shall constitute an offence: penalty, in the case of a written law other than subsidiary legislation, imprisonment of six months and a fine of $8,000;

The provisions of the Interpretation and General Clauses Ordinance will apply to any Act, whenever passed and to any written law, 'save where the contrary intention appears' – see 2(1) of the Act (Cap 4).

The first question which arises is whether a failure to comply with a requirement to give information under s 22 is itself a contravention of a written law such as will bring s 37(2) into effect. An examination of the Prevention of Corruption Act shows that on a number of occasions information may be required to be supplied by various persons to investigating officers. In the majority of these cases, it is made an offence, punishable by fine and imprisonment, to fail to supply the information or perform the other act which has been required by an authorized officer.

In my view, if it had been intended that the general provisions of s 37(2) should be applicable to a failure to supply information under s 22, the Prevention of Corruption Act would have said so. In the absence of any such specific provision, therefore, I must find that a failure to supply information under s 22, although there is a duty to do so, is not of itself an offence which is punishable by a fine, as ASI Hadanan warned the defendant.

Section 24A of the Prevention of Corruption Act is in very wide terms, such as will permit the reception in evidence of the various kinds of statements listed therein. This section does not refer specifically to information given under s 22 of the Act. Neverthless, I have no doubt

that the very wide terms of s 24A are sufficiently comprehensive to include such a statement. By s 24A, any statement tendered in evidence under that section must be a voluntary one. The section thereafter sets out tests of voluntariness which do not differ in essence from those required by s 116 of the Penal Code.

I therefore find that a statement under s 22 must be shown by the prosecution to be voluntary and that the burden is one of proof beyond reasonable doubt. The magistrate, in his ruling in his statement, made it clear that he regarded this burden as lying on the prosecution, by saying, at the conclusion thereof:

> On the evidence before me, and having considered the authorities and argument put forward, I am satisfied beyond reasonable doubt that the statement given by the defendant on the five occasions was voluntary within the meaning of s 24A. Accordingly I rule that this is admissible.

The magistrate, in the course of his judgment, does not appear to have considered whether the reference by ASI Hadanan to an offence and to a fine, if a suspect failed to comply with a request under s 22 of the Prevention of Corruption Act, amounted to such a threat as to vitiate any subsequent confession by the accused.

I have already found that a refusal under s 22 does not amount in law to an offence, although there is a duty to disclose. Not without hesitation, I must find that the reference by ASI Hadanan, to the failure of the defendant to provide information amounting to an offence punishable by a fine in law, amounted to a threat of such a kind that a subsequent confession obtained from a defendant as a result of it should have been ruled as involuntary by the magistrate.

In a long and careful judgment, delivered by the magistrate at the conclusion of the evidence in October 1987, he said that he found both Panjang and Tamat to be 'truthful witnesses, albeit accomplices, and, having warned myself of the danger of convicting on the uncorroborated evidence of an accomplice, I am satisfied beyond reasonable doubt, on their testimony alone, together with the other evidence adduced, even without taking into consideration the defendant's statement as a corroboration of Panjang's testimony, of the defendant's guilt of both charges.'

In one respect the magistrate was too kind to the defendant, in his failure to refer to s 28 of the Prevention of Corruption Act. That section, which in a side note refers to the evidence of accomplices, provides that a witness in a trial is not to be presumed unworthy of credit by reason only of a payment or delivery by him or on his behalf of any gratification to an agent or member of a public body.

In this instance therefore, it was not necessary for the magistrate to warn himself of the rules of law which deal with the evidence of an accomplice. Having warned himself of the dangers of convicting upon the evidence only of an accomplice, the magistrate nevertheless accepts the evidence of Panjang and Tamat as sufficient by themselves to convict the accused of the first two charges.

Mr Szetu, who argued on behalf of the defendant with much skill and determination, put forward for consideration a number of apparent contradictions in the evidence given by both Panjang and Tamat. I do not say that there are no occasions on which an appellate court should interfere with a finding of fact by a trial judge or a magistrate. Nevertheless, this course should be a rare one and be resorted to by an appellate court only if it is clear that the trial magistrate is seriously at fault.

I find no such evidence in this case. There are parts of the testimony of Panjang and Tamat which, taken by themselves, amount to contradictions in what they said. However, the essential part of the evidence of each of these witnesses is that a sum of money, amounting to a gratification under the Act, was paid by each of them to the defendant in order that they should obtain passes to ply their boats between Bandar Seri Begawan and Labuan.

The magistrate, in addition to accepting that the evidence from those two prosecution witnesses is true, regards the defendant as an unimpressive witness who 'told lies in all essential details. I reject his version of the events leading to his arrest on 21 February 1987.'

It is open to a trial court, having considered the circumstances of a case, to believe the evidence of any witness, whether for the prosecution or the defence, so far as its essentials are concerned, without necessarily having to accept as true everything which that witness says. Even if it were correct to say that both Panjang and Tamat had given evidence which was self-contradictory, nevertheless each of them clung to his version of events so far as the defendant is concerned. It was open to the magistrate to accept that part of their evidence, if he so wished and reject any part of it as to which he was not satisfied.

The magistrate stated that he scrutinized the evidence of Panjang and Tamat carefully and observed them when they gave evidence. He accepted their evidence 'in all essential details as truthful and reliable'. He also found that wherever their evidence and that of the defendant conflicted, he accepted their evidence and rejected that of the defendant. It is therefore apparent that, even if the corroborative confession of the defendant is left out of account, the magistrate would necessarily have convicted the defendant on the two charges.

So, when considering whether or not there has been miscarriage of justice, under s 371 of the CPC, by reason

of the improper admission of evidence, I must bear in mind the fact that the magistrate would have convicted the defendant in any event. In the result therefore, I find that, by virtue of the inaccurate warning which the ASI gave to the defendant in relation to s 22, there was a threat hanging over the defendant such as ought to have ruled out the admissions which he made to officers of the Bureau though, if the ASI had *not* suggested that it was an offence to fail to comply with that section, I would have admitted the confessions of the defendant as voluntary even if he had drawn attention to the legal duty imposed by the section.

Nevertheless, even if these statements had not been admitted, I have no doubt that the magistrate would still have accepted the evidence of Panjang and Tamat as correct and convicted the defendant of the first two charges. Accordingly, there has been no failure of justice. I can find no reason to disagree with such a conclusion and accordingly dismiss the appeal against conviction.

Sentence

The question of the proper sentence for a corruption offence has already been considered by me in Criminal Appeal No 1/86: *PP* v *Hamid bin Ibrahim*.[1] In that case, I first drew attention to the fact that a corrupt transaction under s 6, of which this defendant was convicted, carries with it a maximum term of imprisonment of seven years and a fine of $30,000.

I suggested that where a public servant, as the defendant was at the time, is convicted of an offence against s 6, the magistrate should regard a sentence of 12 months' imprisonment as the minimum.

There may, however, be special circumstances in which a magistrate may decide to be more lenient, or perhaps more severe. None of such circumstances seem to apply in this case. The defendant, although he had no previous convictions, was a man of 28, and there was no suggestion that he was subject to any pressure from a superior officer.

In the case to which I have referred, I suggested that I would have imposed a total sentence of 18 months, which is the total sentence imposed by the magistrate in this case. The only question which remains is whether these two sentences ought to be concurrent or consecutive.

The charges of which the defendant was convicted were separated by a period of more than three weeks. Each charge involved a separate person and an entirely separate boat trip from Bandar Seri Begawan to Labuan. I regard each of these charges as a separate and distinct offence for which, in accordance with the principles set out in *Hamid bin Ibrahim*,[1] consecutive sentences should be imposed.

I am satisfied that the sentences imposed by the magistrate on this defendant cannot be said to be excessive and the appeal against sentence is also dismissed.

Appeal dismissed.

Solicitors: *Szetu & Co.*

Reported by *Yap Shao Sin*

Public Prosecutor v Abdul Muhin bin Hj Moksin

HIGH COURT (BANDAR SERI BEGAWAN) – CRIMINAL TRIAL NO 1 OF 1989
ROBERTS CJ
30 JANUARY 1989

Criminal Procedure – Sentencing – Four years' imprisonment and 12 strokes of whipping for offence of robbery – 17-year-old offender – Amendments made to s 392 of Penal Code on imposition of minimum sentence of whipping – Mitigation factor – Penal Code, s 392 – Emergency (Penal Code) (Amendment) Order 1988 – Criminal Procedure Code, s 257(1) – Interpretation and General Clauses Act (Cap 4), s 38

The defendant pleaded guilty to a charge of robbery under s 392 of the Penal Code. In this judgment, the court dwelt on the sentencing principles applicable in the defendant's case.

Held, sentencing the defendant to four years' imprisonment and 12 strokes of whipping with a light rattan cane:

(1) The Emergency (Penal Code) (Amendment) Order 1988 provides that a defendant convicted of an offence against s 392 is liable to the maximum sentence of 30 years' imprisonment and also with whipping of not less than 12 strokes.

(2) As the defendant was aged slightly over 17 at the time of the offence, he was therefore a 'youthful offender' under s 2(1) of the Criminal Procedure Code. By s 257(1) of the Criminal Procedure Code, the maximum sentence of whipping for a youthful offender shall be 12 strokes. Thus in the case of s 392, where a youthful offender is involved, the maximum and minimum number of strokes will be the same.

(3) The court has taken into account the youth of the defendant, his expression of regret, his plea of guilty and his previous conviction for theft. However, no weight is given to the defendant's plea that he was affected by pills, in view of s 84 of the Penal Code. Even if the defendant did not know what he was doing at the time of the robbery, intoxication of this nature cannot constitute a defence since the defendant took the pills voluntarily on his own admission.

Legislation referred to
Criminal Procedure Code ss 2(1), 257(1)
Emergency (Penal Code) (Amendment) Order 1988
Interpretation and General Clauses Act (Cap 4) s 38
Penal Code ss 85, 392

Ivan Leong (Deputy Public Prosecutor) for the State.
Defendant in person.

Cur Adv Vult